United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-4178

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4178

BLEMA MAIGNAN,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

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Pls

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BLEMA MAIGNAN,

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-v.-

IMMIGRATION AND NATURALIZATION SERVICE,

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RESPONDENT'S BRIEF

Statement of the Issues

1. Did the Board of Immigration Appeals abuse its discretion by declining to reopen the deportation proceeding in order to permit the alien to apply for suspension of deportation?

2. Is the issue raised by petitioner with respect to the proviso in Section 244(f) of the Immigration and Nationality Act, 8 U.S.C. 1254(f), properly before the Court?

Statement of the Case

Pursuant to Section 106(a) of the Immigration and

Nationality Act (the "Act"), 8 U.S.C. 1105a(a), Blema Maignan ("Maignan") petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on June 11, 1975, denying what the Board construed to be a motion to reopen the deportation proceedings.

The petitioner had sought to reopen the deportation proceeding in order to apply for the discretionary relief of suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. 1254(a)(1). The Board denied the motion to reopen on the ground that petitioner is statutorily ineligible for suspension of deportation under Section 244(a)(1) since Section 244(f)(3) of the Act, 8 U.S.C. 1254(f)(3), renders ineligible for suspension of deportation any alien who is a native of an "adjacent island" as defined by Section 101(b)(5) of the Act, 8 U.S.C. 1101(b)(5).

Statement of the Facts

The petitioner, Blema Maignan, is a 58 year old alien, a native and citizen of Haiti. He was admitted to the United States as a nonimmigrant visitor for pleasure on January 20, 1967 and was authorized to remain until March 1, 1967. On February 23, 1967 Maignan became employed in violation of his nonimmigrant status. On May 31, 1967 the Immigration and Naturalization Service (the "Service")

instituted deportation proceedings against Maignan by the issuance of an order to show cause and notice of hearing (T. 29).* The Service charged Maignan with being deportable pursuant to the provisions of Section 241(a)(9) of the Act, 8 U.S.C. 1251(a)(9), in that he had failed to maintain his nonimmigrant staus by accepting gainful employment.

At a deportation hearing held on June 14, 1967 (T. 27), Maignan was found deportable as charged and was granted the privilege of voluntary departure in lieu of deportation pursuant to Section 244(e) of the Act, 8 U.S.C. 1254(e). The Immigration Judge also entered an alternate order of deportation to Haiti in the event Maignan failed to depart voluntarily within the prescribed time (T. 26). Maignan's appeal from the order of the Immigration Judge was dismissed by the Board of Immigration Appeals on January 10, 1968 (T. 24). On April 9, 1968 the Board denied Maignan's motion to reopen his deportation proceeding (T. 23).

On May 10, 1968 Maignan submitted another motion requesting that the deportation proceeding be reopened for the purpose of affording him the opportunity to apply for suspension of deportation under Section 244(a)(1) of the Act. In a decision dated July 5, 1968 the Board denied the

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* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record previously filed with the Court.

motion to reopen (T. 22). Although a warrant of deportation had been issued by the Service on June 6, 1968 (T. 13), Maignan's whereabouts could not be ascertained and the final order of deportation could not be enforced.

On February 22, 1971 Maignan married his present wife, also a native and citizen of Haiti, who is a lawful permanent resident of the United States. Maignan had become divorced from his former wife, to whom he had been married at the time of his entry into the United States, on January 23, 1971. Subsequent to his remarriage, Maignan applied for permission to reapply for admission into the United States after deportation as required by Section 212(a)(17) of the Act, 8 U.S.C. 1182(a)(17). In a decision dated December 8, 1972 the application for permission to reapply was denied as a matter of discretion (T. 9). Maignan appealed that decision to the Regional Commissioner of the Service and in a decision dated April 10, 1973 the appeal was dismissed (T. 4).

On May 22, 1973 Maignan filed a petition for a writ of habeas corpus in the United States District Court for the District of Connecticut. The petition was denied and the action dismissed on September 28, 1973.

On March 11, 1974 Maignan submitted an application for suspension of deportation (T. 2). In a decision dated

June 11, 1975 the Board, construing the application for suspension of deportation as a motion or request to reopen Maignan's deportation proceeding to enable him to apply for suspension of deportation, denied the motion to reopen and found that Maignan is ineligible to have his deportation suspended under Section 244(a) of the Act inasmuch as Maignan is a native of Haiti, which is an "adjacent island" under Section 101(b)(5) of the Act, 8 U.S.C. 1101(b)(5), and as such he is ineligible for adjustment of status by virtue of the terms of Section 244(f)(3) of the Act, 8 U.S.C. 1254(f)(3) (T. 1).

By notice dated August 18, 1975 Maignan was directed to surrender for deportation to Haiti on August 27, 1975. However, on August 25, 1975 Maignan filed this petition for review and his deportation has been stayed pursuant to the provisions of Section 106(a)(3) of the Act, 8 U.S.C. 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act of 1952, as amended:

Section 101, 8 U.S.C. 1101 -

* * * * *

(b) As used in subchapters I and II of this chapter -

* * * * *

(5) The term "adjacent islands" includes Saint Pierre, Miquelon, Cuba, the Dominican Republic, Haiti, Bermuda, the Bahamas, Barbados, Jamaica, The Windward and Leeward Islands, Trinidad, Martinique, and other British, French, and Netherlands territory or possessions in or bordering on the Caribbean Sea.

* * * * *

Immigration and Nationality Act of 1952, as amended:

Section 244, 8 U.S.C. 1254 -

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and -

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

(f) No provision of this section shall be applicable to an alien who . . . (3) is a native of any country contiguous to the United States or of any adjacent island named in section 1101(b)(5) of this title: Provided, That the Attorney General may in his discretion agree to the granting of suspension of deportation to an alien specified in clause (3) of this subsection if such alien establishes to the satisfaction of the Attorney General that he is ineligible to obtain a non-quota immigrant visa.

Relevant Regulations

Title 8, Code of Federal Regulations (8 C.F.R.):

3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him and an opportunity to apply therefor was afforded him at the former hearing unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing. * * * * *

Title 8, Code of Federal Regulations (8 C.F.R.):

3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material . . . . In any case in which a deportation order is in effect, there shall be included in the motion to reopen or reconsider such order a statement by or on behalf of the moving party declaring whether the subject of the deportation order is also the subject of any pending criminal proceeding under Section 242(e) of the Act, and, if so, the current status of that proceeding. If the motion to reopen or reconsider is for the purpose of seeking discretionary relief, there shall be included in the motion a statement by or on behalf of the moving party declaring whether the alien for whose relief the motion is filed is subject to any pending criminal prosecution and, if so, the nature and current status of that prosecution. Motions to reopen or reconsider shall state whether the validity of the deportation order has been or is the subject of any judicial proceeding and, if so, the nature and date thereof, the court in which such proceeding took place or is pending, and its result or status. * * * * *

(b) Distribution of motion papers when alien is moving party. In any case in which a motion to reopen or a motion to reconsider is made by the alien or other party affected, the three copies of the motion papers shall be submitted to the officer of the Service having administrative jurisdiction over the place where the proceedings were conducted. * * * * *

ARGUMENT

POINT I.

THE ISSUE RAISED BY THE PETITIONER WITH RESPECT TO THE BOARD'S FAILURE TO CONSIDER THE ALLEGED APPLICABILITY OF THE PROVISO OF SECTION 244(f)(3) TO HIS CASE IS NOT PROPERLY BEFORE THIS COURT

Petitioner contends that the Board abused its discretion in denying the motion to reopen since the Board failed to consider whether or not the proviso of Section 244(f)(3) is applicable to petitioner. The Board held that the petitioner is statutorily ineligible for suspension of deportation under Section 244(a)(1) of the Act by virtue of Section 244(f)(3) of the Act which makes the provisions of Section 244(a)(1) inapplicable to aliens who are natives of adjacent islands as that term is defined in Section 101(b)(5) of the Act. Since Maignan is a native of Haiti, an "adjacent island" within the definition of Section 101(b)(5), he is ineligible for adjustment of status under Section 244(a)(1).

Maignan contends, however, that since he has been denied permission to reapply for admission into the United States after deportation he is ineligible to receive a non-quota immigrant visa and thus his ineligibility for suspension of deportation is removed by virtue of the proviso of Section 244(f)(3). That section provides that the Attorney General may in his discretion agree to suspend the deportation of an alien who is a native of a country contiguous to the

United States or of an adjacent island if the alien can establish to the satisfaction of the Attorney General that he is ineligible to obtain a nonquota immigrant visa.

Whatever the merits of Maignan's contention may be, the issue raised by him with respect to the applicability of Section 244(f)(3) in this case is not properly before this Court. The record clearly establishes that the issue now raised by the petitioner was never raised before the Board. Petitioner did not comply with the regulations which govern the submission of motions to reopen deportation proceedings. See 8 C.F.R. 3.2 and 3.8. He submitted nothing other than an application for suspension of deportation on an official Service form. No reference was made therein to the denial of his application for permission to reapply for admission into the United States after deportation.

Many cases support the proposition, as stated by the Supreme Court, that

> "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its actions." Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 155 (1946).

Likewise, in United States v. L.A. Tucker Truck Lines, 344

U.S. 33 (1952), the Supreme Court held that its "general rule" should be applied:

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that the courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." Id. at 37.

The reasoning behind this rule was well-expressed by the Court in D.C. Transit System Inc v. Washington Metropolitan Area, 466 F.2d 394 (D.C. Cir.), cert. denied, 409 U.S. 1086 (1972), when it stated:

> ". . . contentions to be urged on appellate review of judicial proceedings must be properly raised and preserved in the trial court. Not the least of those considerations is the opportunity, through precise identification of the errors alleged, for administrative reexamination and correction prior to judicial intervention in the regulatory process. We have long admonished that points not subjected to agency scrutiny during administrative proceedings will not normally be entertained on judicial review." Id. at 414.

It is submitted, therefore, that petitioner's failure to raise the issue presented on this petition for review to the Board for its consideration, or to seek reconsideration of the Board's decision, precludes this Court from considering the issue. Should the Court disagree with our position, it is submitted that the matter must be remanded to the Board for consideration of what is apparently an issue not

previously considered by the Board in this or any other case.

POINT II.

THE BOARD OF IMMIGRATION APPEALS DID NOT ABUSE ITS DISCRETIONARY AUTHORITY IN DECLINING TO REOPEN THE DEPORTATION PROCEEDING TO PERMIT THE ALIEN TO APPLY FOR SUSPENSION OF DEPORTATION

A. The reopening of a deportation proceeding is a matter of discretion.

The Immigration and Nationality Act contains no specific provision for the reopening of a deportation proceeding. The Attorney General under his broad grant of authority to administer and enforce the Act, has promulgated regulations which permit reopening as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

Clearly, the regulations contemplate that a motion to reopen contain an offer of evidence, that the evidence be heretofore unobtainable, and that the evidence be sufficient to warrant the grant of the relief sought. Accordingly, the

Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. Where such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Suspension of deportation.

Suspension of deportation pursuant to Section 244(a) of the Act, 8 U.S.C. 1254(a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident alien without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. 1254(c); McGrath v. Kristensen, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been

physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.

The applicant for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); Kimm v. Rosenberg, 363 U.S. 405 (1960), rehearing denied, 364 U.S. 854. If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. Hintopoulos v. Shaughnessy, supra; Wong Wing Hang v. I.N.S., 360 F.2d 715 (2d Cir. 1966); Ng v. Pilliod, 279 F.2d 207 (7th Cir.), cert. denied, 365 U.S. 860 (1960). Accordingly, when making a motion to reopen, it was incumbent upon the petitioner to offer evidence to show not only that he was statutorily eligible, but that he merited the extraordinary relief he sought as a matter of discretion.

C. Petitioner offered no evidence in support of his motion to reopen and such reopening was not warranted.

As the Board noted, the petitioner did not submit a formal motion to reopen in compliance with the regulations which set forth the criteria to be met by a motion to reopen. The petitioner offered no proof whatsoever in support of his application for suspension of deportation, which the Board liberally construed as a motion to reopen. While the application contained information showing that Maignan had seven years continuous physical presence in the United States, there was absolutely no evidence, not even in the form of a simple statement, that Maignan's deportation would result in extreme hardship to either himself or to his lawful permanent resident spouse. Nor was there any offer of proof of facts to show that Maignan merited the favorable exercise of discretion. To the contrary, the record indicated that Maignan had managed to accumulate his seven years of physical presence by having resorted to a series of tactics aimed only at delay. These tactics had the effect of delaying execution of the concededly valid order of deportation since 1967.

Furthermore, the Board was confronted with the fact that Maignan is a native of Haiti and as such he is statutorily ineligible for suspension of deportation by

the terms of Section 244(f)(3) of the Act. Although the Board apparently did not consider the applicability of the proviso of Section 244(f)(3) to the petitioner, we submit that the Board's decision was well-grounded and should be upheld. The fact that the alien has resorted to dilatory tactics to extend a concededly illegal stay is a reasonable ground for the withholding of discretionary relief. Jimenez v. Barber, 252 F.2d 550 (7th Cir. 1968); Goon Ming Wah v. I.N.S., 386 F.2d 292 (1st Cir. 1967). This doctrine is particularly true in this area where the favorable exercise of discretion is purely a matter of administrative grace. Cf. Fan Wan Keung v. I.N.S., 434 F.2d 30 (2d Cir. 1970); United States ex rel. Lee Pao Fen v. Esperdy, 423 F.2d 6 (2d Cir. 1970); Lam Tai Sin v. Esperdy, 334 F.2d 999 (2d Cir. 1964), cert. denied, 379 U.S. 901 (1965).

D. Scope of review.

If the Court finds that the issue presented by the petitioner is properly before it, then the only issue presented in this petition for review is whether or not the Board abused its discretionary authority in denying the petitioner's motion to reopen. As we have indicated, the grant or denial of a motion to reopen is discretionary.

Novinc v. I.N.S., 371 F.2d 272 (7th Cir. 1967). The scope of judicial review is extremely narrow. Muskardin v. I.N.S., 415 F.2d 865 (2d Cir. 1969); Zupicich v. Esperdy, 319 F.2d 773 (2d Cir. 1963). Where, as here, the alien offered no evidence which would result in a grant of the relief sought, the denial of such a motion is not an abuse of discretion. Cheng Kai Fu v. I.N.S., 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968).

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
Special Assistant United States Attorney,
Of Counsel.

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

CA 75-4178

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that She is employed in the Office of the United States Attorney for the Southern District of New York.

That on the
22nd day of March, 19 76 s he served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Victor Mr. Ferrante, Esqs.,
285 Golden Hill St.
Bridgeport, Conn. 06604

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

22 day of March, 19 76

Ralph L. Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1978